

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Retention by Broadcasters)	
Of Program Recordings)	MB Docket No. 04-232
)	

To: The Commission

COMMENTS OF SALEM COMMUNICATIONS CORPORATION (“Salem”), the parent corporation of the licensees of 98 radio stations (listed on the attached Exhibit “1”), pursuant to the Notice of Proposed Rulemaking, MB Docket No. 04-232 (the “NPRM”), submits its comments to the Commission’s proposal to require licensees to make and retain recordings of programming carried on broadcast stations.

Salem’s Experience in Broadcasting

Salem has owned and operated radio stations for over 25 years. Salem’s foundational programming format is Christian teaching and talk, and Salem is the leading U.S. broadcaster focused on religious and family-themed programming.

Introduction

As a religious and family broadcaster, Salem shares the Commission’s view of the importance of keeping the airwaves free of indecent programming, particularly when children are likely to be in the audience. However, Salem has serious concerns that the proposed record retention requirements set forth in the NPRM would have substantial negative consequences for broadcasters which would significantly outweigh any benefit that those requirements might provide in the enforcement of FCC indecency

regulations. Specifically, stations would be forced to expend both monetary and personnel resources in maintaining the required recordings and in responding to demands from third parties for information in those recordings. The proposed rules also raise important First Amendment issues and could cause stations to violate intellectual property laws. To the extent that the Commission elected to use these recordings as enforcement tools for other FCC regulations, the proposed rules also could substantially increase the burden on stations to prove their regulatory compliance. Finally, under the current Commission standard for evaluating indecency complaints, the proposed rules are not necessary, as recordings serve to disprove rather than prove indecency claims.

If the Commission decides to impose a program recording and retention requirement upon broadcast stations, the Commission should retain its current policy of requiring a complainant to submit a tape or transcript of the material in question, to lessen the possibility of frivolous complaints. In addition, due to the costs of compliance with these rules, a program retention requirement should only be imposed upon stations which have been the subject of a forfeiture or other enforcement action for the broadcast of indecent programming.

Direct Costs Associated With Program Retention

Any requirement that stations make and retain copies of programming for 60 or 90 days will have both initial and ongoing costs for broadcasters. To establish such a recording system, a station will need to install a device that is capable of capturing and storing sixteen hours (if stations are required to retain only their 6 a.m. to 10 p.m. programming) or twenty-four hours (if stations are required to tape all programming) of broadcast material. In addition, each station must have a means of archiving that material for the 60- or 90-day period.

As a radio broadcaster, Salem has examined this issue only with respect to recording audio programming. Several methods of recording and retaining radio broadcasts are technically possible, including audiotapes, compact discs, and computer storage. The most efficient currently available means to store programming is on computer hard drives, with archival to compact discs or DVDs as necessary. The size of the hard drive and storage space needed to store audio broadcasts depends upon the quality and type of audio file used. Salem estimates that using MPEG-2 files, which store compressed broadcast quality audio, sixteen hours of programming would occupy approximately 1.5 to 2 gigabytes of space. Over a sixty-day period, a station would need up to 120 gigabytes of storage to retain this programming, and a ninety-day retention period would require as much as 180 gigabytes of space. Thus, a station would need a reliable computer system with a large hard drive and the necessary hardware and software to automatically record its programming in order to comply with the proposed rules.¹ A mid-level estimate of the cost of such a computer system would be \$2,000.

Stations would face other initial costs to comply with the proposed rules in addition to the recording system. Each station would need to hire computer personnel or divert existing staff to install and test the recording system. Further, each station would need to maintain a redundant backup system, in order to guarantee that the station's programming was recorded in the event of a failure in any part of the primary recording system. To cover this contingency, stations would have to purchase and operate a second computer recording system. Additional "emergency" equipment, such as automatic power supplies, also would be required to ensure that the recording

¹ Alternatively, a station could use a smaller hard drive, if the station regularly archived the information to CD. However, this would require substantial additional staff time to create the archives, which would likely exceed the marginal additional cost of the larger hard drive.

continued if other problems arose. Therefore, each station will need to spend several thousand dollars to begin compliance with the proposed rules as set forth in the NPRM.

Salem, with 98 stations, would incur hundreds of thousands of dollars to set up systems for each of its stations.

After the recording system becomes operational, stations will have to incur ongoing costs to maintain it. Stations will need to allocate time and money to address equipment failures, hardware and software upgrades, and computer maintenance on these systems. These costs are difficult to estimate, would vary from station to station, and could be significant.

The proposed system also is unnecessarily burdensome in that it will result in hundreds and thousands of recordings of identical network and syndicated programming. Each station which receives a network or syndicated program will be forced to devote resources to making and retaining a copy of that program. There is no useful purpose in requiring all stations to maintain these duplicate recordings, as only one copy is necessary to determine whether the programming in question was indecent.

The NPRM notes that only 169 of 14,379 complaints, or 1.175%, were dismissed between 2000 and 2002 for lack of a tape, transcript, or significant excerpts. The large volume of complaints that satisfied the transcript requirement evidences that listeners are able to effectively complain to the Commission about indecency without the need for program recordings from broadcasters. The minimal benefit to the Commission of being able to substantively examine the minute percentage of additional complaints that were dismissed is outweighed by the substantial burden on broadcasters to implement the proposed retention system.

Ancillary costs resulting from program retention rules

If the FCC enacts a program retention requirement, stations will be forced to bear ancillary costs in addition to the expense of actually operating the system. For example, once the recording requirement becomes public knowledge, each station will be subject to having to respond to subpoenas and other discovery requests with respect to any lawsuit that might involve the content of their programming, even if the station is not a party to the lawsuit. Disputes involving false advertising of a product, intellectual property infringement, defamation, and contract claims between advertisers and clients are but a few of the types of lawsuits that will likely result in stations being forced to provide copies of programs or commercials previously broadcast. These demands for copies of programs will require stations either to incur legal costs to resist them, or to expend time and money in responding to them. This is an additional major burden that a mandatory program retention requirement would place on stations.

First Amendment Issues

Salem is troubled by the program retention requirements set forth in the NPRM from a First Amendment perspective. These issues are complex, and as other NPRM comments will examine them in detail, Salem will not address them in depth. Nevertheless, Salem does want to point out that these proposed requirements will likely have a profound “chilling effect” upon programming content. This is particularly true given the FCC’s recent interpretation of the indecency rules, where a single, isolated use of an epithet was deemed to be “indecent”². The massive prospective increase in forfeiture amounts for indecent programming in the 2004 Broadcast Indecency Enforcement Act would exacerbate the negative effect upon broadcasters. These huge

² Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 FCC Rcd 4975.

financial penalties for broadcasting any word or idea that the FCC might deem “indecent”, when coupled with the program retention requirements that will memorialize every potential “indecent” utterance, will cause stations to avoid anything that has even a remote chance of offending these rules. This is a textbook example of a “chilling effect” upon broadcasters’ exercise of their First Amendment rights.

Intellectual Property Issues

The NPRM, if implemented, also may result in intellectual property problems for broadcasters. The most striking example of this would be if the Commission decided that the programs retained by stations were public files, for which members of the public could request copies. This would require stations to duplicate music and other programs for distribution to anyone who requested them, even though the stations would not have the intellectual property rights to make those copies. Even if the public were not permitted to obtain the stored files, the recording and archiving of content such as sporting events, commercials, and other programming provided to stations by third parties for broadcast may cause the stations to violate the intellectual property rights of those content providers.

Use of Program Retention for Enforcement of Other FCC Regulations

The Commission’s use of a program retention requirement to enforce other FCC broadcast regulations can be expected to substantially increase the burdens upon stations to establish regulatory compliance. If program retention were to be used in this way, stations would need to record all of their programming, not just that occurring between 6 a.m. and 10 p.m., and programs might need to be kept for more than 60 or 90 days, which would increase the cost to stations for additional storage. Of greater significance is the potential for the Commission to impose burdensome additional reporting requirements upon stations due to the existence of the stored programming.

For example, stations could be required to provide copies of its programming to the Commission to prove that it met all of its political equal opportunities requirements (47 C.F.R. §73.1941), made its station identification (47 CFR §73.1201) and sponsor identification (47 CFR §73. 1212) announcements, adhered to the regulations for broadcasting contests (47 CFR §73.1216), and made its license renewal announcements (47 CFR §73.3580). The use of a program retention policy to enforce other Commission regulations raises the prospect of broadcasters being overwhelmed by the need to parse through these recordings to supply proof of compliance with the many rules affecting on-air programming. There is no indication that stations currently fail to comply with these FCC regulations at any meaningful level such that this kind of drastic enforcement mechanism is needed.

The Proposed System Is Unnecessary Under Current Commission Standards

Imposing a program retention requirement upon broadcasters is unnecessary under the current Commission standard for evaluating indecency complaints. The NPRM notes, in footnote 7, that “in cases in which a licensee can neither confirm nor deny the allegations of indecent broadcasts in a complaint, [the Commission has] held that the broadcasts occurred.” Under this standard, a recording of a program would serve only to disprove, rather than prove, that an indecent broadcast occurred. As footnote 7 suggests, given the Commission’s position, it may be in a station’s best interest to voluntarily record its programming, so that it is in a position to disprove any indecency allegations that may be asserted against it. However, given the Commission’s standard that if a station cannot deny the indecency allegations, the Commission will accept them as true, there is no reason whatsoever to require stations to record programming simply to confirm what the Commission would otherwise conclude in the absence of those recordings.

The Commission Should Retain Its Current Complaint Procedure

Even if the Commission decides to implement the proposed program retention rules, the Commission should retain its requirement that a complainant submit a tape or transcript of the material in question when filing an indecency complaint. In the absence of such a threshold requirement for having an indecency complaint considered by the Commission, stations (and the Commission) will be forced to expend resources to respond to a potential deluge of complaints based upon a mere assertion that a listener heard something indecent. Groups could easily manipulate the complaint process to put pressure upon stations to eliminate programming with which they disagreed by organizing a campaign to file repeated unsupported indecency complaints against a station. In such a situation, a station might be forced to remove the programming from the air to avoid the expense of responding to all of the complaints.

Retaining the current tape or transcript requirement for indecency complaints also will enable a broadcaster to more easily confirm or deny whether the purported indecent material was in fact broadcast. Without a transcript or tape from a complainant available as a reference, a broadcaster may have to search through (and provide to the Commission) long segments of programming to determine whether a listener's indecency complaint might be accurate. The requirement of a tape or transcript will allow a broadcaster to more easily locate the portion of the broadcast in question and, by comparing the listener's transcript to the retained program recordings, to have a high degree of certainty that it is providing the Commission with the relevant programming segment.

The Proposed Rules, If Adopted, Should Not Apply to All Broadcasters

As discussed above, the proposed retention requirements will impose substantial economic burdens upon broadcasters with minimal benefit to the Commission. To the

extent that the Commission believes that such requirements could be useful to better enforce its indecency rules where problems currently exist, the rules should be more narrowly tailored to serve that purpose. Specifically, the Commission should only impose a program retention requirement upon stations which have been the subject of a forfeiture or other penalty for broadcasting indecent material. This would enable the Commission to vigorously enforce the indecency rules against any repeat offenders, while sparing the vast majority of broadcasters, who already comply with the indecency requirements, from the substantial and unnecessary expense of implementing and maintaining a program retention system.

Respectfully submitted,

Salem Communications Corporation

By:

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EXHIBIT “1”
LIST OF SALEM STATIONS

Salem Communications Corporation is the ultimate parent company of the licensees of the following stations:

<u>Station</u>	<u>Licensee</u>	<u>Facility ID No.</u>
KDAR(FM), Oxnard, CA	Atep Radio, Inc.	3077
KGFT(FM), Pueblo, CO	Bison Media, Inc.	20579
KSKY(AM), Balch Springs, TX	Bison Media, Inc.	6591
KBIQ(FM), Manitou Springs, CO	Bison Media, Inc.	73073
KZNT(AM), Colorado Springs, CO	Bison Media, Inc.	70825
WITH(AM), Baltimore, MD	Caron Broadcasting, Inc.	25527
KKFS(FM), Dunnigan, CA	Caron Broadcasting, Inc.	51220
KTIE(AM), San Bernardino, CA	Caron Broadcasting, Inc.	58808
WTSJ(AM), Cincinnati, OH	Caron Broadcasting, Inc.	25525
WCCD(AM), Parma, OH	Caron Broadcasting, Inc.	25522
WKNR(AM), Cleveland, OH	Caron Broadcasting, Inc.	28509
WBOB(AM), Florence, KY	Caron Broadcasting, Inc.	35065
WHK(AM), Cleveland, OH	Caron Broadcasting, Inc.	14772
WFZH(FM), Mukwonago, WI	Caron Broadcasting, Inc.	88081
KFIS(FM), Scappoose, OR	Caron Broadcasting, Inc.	50553
WFFH(FM), Smyrna, TN	Caron Broadcasting, Inc.	68347
WFFI(FM), Kingston Springs, TN	Caron Broadcasting, Inc.	18714
WBGB(FM), Ponte Vedra Beach, FL	Caron Broadcasting, Inc.	28894
WZNZ(AM), Jacksonville, FL	Caron Broadcasting, Inc.	51976
WJGR(AM), Jacksonville, FL	Caron Broadcasting, Inc.	29736
WZAZ(AM), Jacksonville, FL	Caron Broadcasting, Inc.	68761
KCEE(FM), Grass Valley, CA	Caron Broadcasting, Inc.	87969
WRMR(AM), Cleveland, Ohio	Caron Broadcasting, Inc.	72299
KKMS(AM), Richfield, MN	Common Ground Broadcasting, Inc.	18518
KYCR(AM), Golden Valley, MN	Common Ground Broadcasting, Inc.	10828
KKNT(AM), Phoenix, AZ	Common Ground Broadcasting, Inc.	13508
KPXQ(AM), Glendale, AZ	Common Ground Broadcasting, Inc.	55912
WTBN(AM), Pinellas Park, FL	Common Ground Broadcasting, Inc.	51985
KIKN(AM), Port Angeles, WA	Common Ground Broadcasting, Inc.	63519
KFAX(AM), San Francisco, CA	Golden Gate Broadcasting Co., Inc.	24510
KSFB-FM, San Rafael, CA	Golden Gate Broadcasting Co., Inc.	40136
K265DI, Sausalito, CA	Golden Gate Broadcasting Co., Inc.	43944
KGW(AM), Burien-Seattle, WA	Inspiration Media, Inc.	28819
KLFE(AM), Seattle, WA	Inspiration Media, Inc.	12031
KTFH(AM), Seattle, WA (expanded band CP)	Inspiration Media, Inc.	87153

<u>Station</u>	<u>Licensee</u>	<u>Facility ID No.</u>
KKMO(AM), Tacoma, WA	Inspiration Media, Inc.	33301
KKOL(AM), Seattle, WA	Inspiration Media, Inc.	20355
KLTY(FM), Arlington, TX	Inspiration Media of Texas, LLC	2809
KWRD-FM, Highland Village, TX	Inspiration Media of Texas, LLC	6560
KPXI(FM), Overton, TX	Inspiration Media of Texas, LLC	29916
WEZE(AM), Boston, MA	New England Continental Media, Inc.	3594
KKLA-FM, Los Angeles, CA	New Inspiration Broadcasting Co., Inc.	48453
KRLA(AM), Glendale, CA	New Inspiration Broadcasting Co., Inc.	61267
KXXM(AM), Anaheim, CA	New Inspiration Broadcasting Co., Inc.	2194
KFSH-FM, Anaheim, CA	New Inspiration Broadcasting Co., Inc.	2195
WGKA(AM), Atlanta, Georgia	Pennsylvania Media Associates, Inc.	65976
WFIL(AM), Philadelphia, PA 52193	Pennsylvania Media Associates, Inc.	
WNTP(AM), Philadelphia, PA	Pennsylvania Media Associates, Inc.	52194
WORD-FM, Pittsburgh, PA	Pennsylvania Media Associates, Inc.	58627
WPIT(AM), Pittsburgh, PA	Pennsylvania Media Associates, Inc.	58624
WTTT(AM), Boston, MA	Pennsylvania Media Associates, Inc.	25051
KPRZ(AM), San Marcos-Poway, CA 54461	Radio 1210, Inc.	
KCBQ(AM), San Diego, CA	Radio 1210, Inc.	13509
WBOZ-FM, Woodbury, TN	Reach Satellite Network, Inc.	15531
WVRY-FM, Waverly, TN	Reach Satellite Network, Inc.	41865
KRKS(AM), Denver, CO	Salem Media of Colorado, Inc.	58632
KBJD(AM), Denver, CO (expanded band license)	Salem Media of Colorado, Inc.	87151
KRKS-FM, Lafayette, CO	Salem Media of Colorado, Inc.	58631
KNUS(AM), Denver, CO	Salem Media of Colorado, Inc.	42377
WAFS(AM), Atlanta, GA	Salem Media of Georgia, Inc.	72111
WNIV(AM), Atlanta, GA	Salem Media of Georgia, Inc.	23607
WLTA(AM), Alpharetta, GA	Salem Media of Georgia, Inc.	42660
KHNR(AM), Honolulu, HI	Salem Media of Hawaii, Inc.	13880
KHNR-FM, Honolulu, HI	Salem Media of Hawaii, Inc.	34620
KGU(AM), Honolulu, HI	Salem Media of Hawaii, Inc.	53705
KAIM(AM), Honolulu, HI	Salem Media of Hawaii, Inc.	10934
KAIM-FM, Honolulu, HI	Salem Media of Hawaii, Inc.	10950
KHCM(AM), Waipahu, HI	Salem Media of Hawaii, Inc.	14937
KHUI(FM), Honolulu, HI	Salem Media of Hawaii, Inc.	641
KJPN(AM), Honolulu, HI	Salem Media of Hawaii, Inc.	13985
WRVI(FM), Valley Station, KY	Salem Media of Kentucky, Inc.	50764
WFIA-FM, New Albany, IN	Salem Media of Kentucky, Inc.	48371
WGTK(AM), Louisville, KY	Salem Media of Kentucky, Inc.	63936
WZFS(FM), Des Plaines, IL	Salem Media of Illinois, LLC	25053
WMCA(AM), New York, NY	Salem Media of New York, LLC	58626
WWDJ(AM), Hackensack, NJ	Salem Media of New York, LLC	58635
WRFD(AM), Columbus-Worthington, OH	Salem Media of Ohio, Inc.	58630

KPDQ(AM), Portland, OR	Salem Media of Oregon, Inc.	58628
<u>Station</u>	<u>Licensee</u>	<u>Facility ID No.</u>
KPDQ-FM, Portland, OR	Salem Media of Oregon, Inc.	58629
KSLR(AM), San Antonio, TX	Salem Media of Texas, Inc.	58634
WAVA(FM), Arlington, VA	Salem Media of Virginia, Inc.	
4644		
WABS(AM), Arlington, VA	Salem Media of Virginia, Inc.	
		54465
WWTC(AM), Minneapolis, MN	SCA License Corporation	9676
WRRD(AM), Jackson, WI	SCA License Corporation	10824
WYLL(AM), Chicago, IL	SCA License Corporation	28630
WHKW(AM), Warren, OH	SCA License Corporation	57235
WFIA(AM), Louisville, KY	SCA License Corporation	55504
WROL(AM), Boston, MA	SCA License Corporation	9139
WFHM-FM, Cleveland, OH	SCA License Corporation	54778
WBTK(AM), Richmond, VA	SCA License Corporation	57831
KNTS(AM), Palo Alto, CA	SCA-Palo Alto, LLC	65485
WFSH-FM, Athens, GA	South Texas Broadcasting, Inc.	56390
KLUP(AM), Terrell Hills, TX	South Texas Broadcasting, Inc.	34975
WTWD(AM), Plant City, FL	South Texas Broadcasting, Inc.	26145
KKHT(AM), Houston, TX	South Texas Broadcasting, Inc.	61174
KTEK(AM), Alvin, TX	South Texas Broadcasting, Inc.	10827
KFIA(AM), Carmichael, CA	Vista Broadcasting, Inc.	50300
KTKZ(AM), Sacramento, CA	Vista Broadcasting, Inc.	59599